

In re: HERMAN E. HOFFMAN, JR., d/b/a HERMAN AND ASSOCIATES, AND BILLY G. TURNER, d/b/a WES AND MOM TRUCKING.

P.Q. Docket No. 00-0010.

Decision and Order as to Billy G. Turner, d/b/a Wes and Mom Trucking, filed June 12, 2001.

Default – Failure to file timely answer – Imported fire ant – Answer requirements – Attorney of record – Appearance.

The Judicial Officer affirmed the Default Decision issued by Chief Administrative Law Judge James W. Hunt (Chief ALJ): (1) concluding Respondent Billy G. Turner moved articles regulated to prevent the interstate spread of imported fire ant from the quarantined area of Montgomery County, Texas, into the nonquarantined area of Arizona without a certificate or limited permit in violation of 7 C.F.R. §§ 301.81-.81-10; and (2) assessing Respondent Billy G. Turner a \$1,000 civil penalty. The Judicial Officer deemed Respondent Billy G. Turner's failure to file a timely answer to the Complaint an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)). The Judicial Officer rejected Respondent Billy G. Turner's contention that an answer that was not signed by Respondent Billy G. Turner or Respondent Billy G. Turner's attorney was Respondent Billy G. Turner's timely-filed answer (7 C.F.R. § 1.136(a)).

James A. Booth, for Complainant.

Respondent Billy G. Turner, d/b/a Wes and Mom Trucking, Pro se.

Initial decision issued by James W. Hunt, Chief Administrative Law Judge.

Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on June 1, 2000. Complainant instituted this proceeding under the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-154, 156-164a, 167) [hereinafter the Plant Quarantine Act]; the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) [hereinafter the Federal Plant Pest Act]; regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act (7 C.F.R. §§ 301.81-.81-10); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that on or about August 25, 1998, Herman E. Hoffman, Jr., d/b/a Herman and Associates, and Billy G. Turner, d/b/a Wes and Mom Trucking, moved regulated articles (a used bulldozer and trailer, soil) from the quarantined area of Montgomery County, Texas, into the nonquarantined area of

Arizona without a certificate or limited permit in violation of 7 C.F.R. § 301.81-4(a) (Compl. ¶ III).

The Hearing Clerk served Billy G. Turner with the Complaint, the Rules of Practice, and a service letter at 110 3rd Street, Moore, Texas, on June 12, 2000.¹ Respondent Billy G. Turner failed to file an answer to the Complaint within 20 days after service of the Complaint, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).² On July 19, 2000, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Default Decision and Order as to Billy G. Turner, d/b/a Wes and Mom Trucking [hereinafter Motion for Adoption of Proposed Decision and Order], and a Proposed Default Decision and Order as to Billy G. Turner, d/b/a Wes and Mom Trucking [hereinafter Proposed Decision and Order]. The Hearing Clerk served Billy G. Turner with Complainant's Motion for Adoption of Proposed Decision and Order, Complainant's Proposed Decision and Order, and a service letter on July 28, 2000.³ Billy G. Turner failed to file objections to Complainant's Motion for Adoption of Proposed Decision and Order and Complainant's Proposed Decision and Order within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). The Hearing Clerk sent Billy G. Turner a letter dated August 18, 2000, stating that objections to Complainant's Motion for Adoption of Proposed Decision and Order and Complainant's Proposed Decision and Order had not been filed within the allotted time and that the record was being referred to an administrative law judge for consideration and decision.

On August 28, 2000, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] issued a Default Decision and Order as to Billy G. Turner, d/b/a Wes and Mom Trucking [hereinafter Initial Decision and Order as to Billy G. Turner]: (1) finding that on or about August 25, 1998, Billy G. Turner moved regulated articles (a used bulldozer and trailer, soil) from the quarantined area of

¹ See Domestic Return Receipt for Article Number P093175253; Memorandum from "RAParis" dated June 6, 2000.

² Billy G. Turner contends he filed a timely Answer to the Complaint. I reject Billy G. Turner's contention that he filed a timely Answer. The basis for Billy G. Turner's contention that he filed a timely Answer and my reasons for rejecting Billy G. Turner's contention are discussed in this Decision and Order, *infra*.

³ See Domestic Return Receipt for Article Number P093175280.

Montgomery County, Texas, into the nonquarantined area of Arizona without a certificate or limited permit, as required; (2) concluding that Billy G. Turner violated the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. § 301.81 *et seq.*; and (3) assessing Billy G. Turner a \$1,000 civil penalty (Initial Decision and Order as to Billy G. Turner at 2).

The Hearing Clerk served Billy G. Turner with the Initial Decision and Order as to Billy G. Turner on September 7, 2000.⁴ On October 2, 2000, Billy G. Turner appealed to the Judicial Officer. Billy G. Turner filed his appeal petition within 30 days after receiving service of the Initial Decision and Order as to Billy G. Turner as required by section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)). Thus, Billy G. Turner's appeal petition was timely filed. Nevertheless, on October 17, 2000, the Hearing Clerk issued a Notice of Effective Date of Default Decision and Order as to Billy G. Turner, d/b/a Wes and Mom Trucking, stating, as follows:

The Decision and Order issued by Administrative Law Judge James W. Hunt on August 28, 2000, has not been appealed to the Secretary within the allotted time.

In accordance with the applicable rules of practice, the decision became final on October 10, 2000, and effective on October 16, 2000.

On May 4, 2001, the Hearing Clerk issued a letter stating that Billy G. Turner's appeal petition was timely filed and providing Complainant with 20 days within which to file a response to Billy G. Turner's appeal petition.

On May 31, 2001, Complainant filed Complainant's Response to the Appeal of the Default Decision and Order as to Billy G. Turner, d/b/a Wes and Mom Trucking. On June 5, 2001, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the Chief ALJ's Initial Decision and Order as to Billy G. Turner. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Initial Decision and Order as to Billy G. Turner as the final Decision and Order as to Billy G. Turner, d/b/a Wes and Mom Trucking, with minor modifications. Additional conclusions by the Judicial Officer follow the Chief ALJ's conclusions of law, as restated.

⁴ See Domestic Return Receipt for Article Number Z 599 738 618.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 7B—PLANT PESTS

....

§ 150gg. Violations

....

(b) Civil penalty

Any person who—

(1) violates section 150bb of this title or any regulation promulgated under this chapter[]

....

may be assessed a civil penalty by the Secretary not exceeding \$1,000. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of title 28. The validity of such order may not be reviewed in an action to collect such civil penalty.

....

**CHAPTER 8—NURSERY STOCK AND OTHER PLANTS
AND PLANT PRODUCTS**

....

§ 163. Violations; forgery, alterations, etc., of certificates;

punishment; civil penalty

. . . Any person who violates any . . . rule[] or regulation [promulgated by the Secretary of Agriculture under this chapter] . . . may be assessed a civil penalty by the Secretary not exceeding \$1,000. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of title 28. The validity of such order may not be reviewed in an action to collect such civil penalty.

7 U.S.C. §§ 150gg(b), 163.

7 C.F.R.:

TITLE 7—AGRICULTURE

....

**SUBTITLE B—REGULATIONS OF THE DEPARTMENT
OF AGRICULTURE**

....

**CHAPTER III—ANIMAL AND PLANT HEALTH
INSPECTION SERVICE,
DEPARTMENT OF AGRICULTURE**

....

PART 301—DOMESTIC QUARANTINE NOTICES

Subpart—Imported Fire Ant

quarantine and regulations

§ 301.81 Restrictions on interstate movement of regulated articles.

No person may move interstate from any quarantined area any regulated article except in accordance with this subpart.

§ 301.81-2 Regulated articles.

The following are regulated articles:

- (a) Imported fire ant queens and reproducing colonies of imported fire ants.
- (b) Soil, separately or with other articles, except potting soil that is shipped in original containers in which the soil was placed after commercial preparation.
- (c) Baled hay and baled straw stored in direct contact with the ground;
- (d) Plants and sod with roots and soil attached, except plants maintained indoors in a home or office environment and not for sale;
- (e) Used soil-moving equipment, unless removed of all noncompacted soil; and
- (f) Any other article or means of conveyance when:
 - (1) An inspector determines that it presents a risk of spread of the imported fire ant due to its proximity to an infestation of the imported fire ant; and
 - (2) The person in possession of the product, article, or means of conveyance has been notified that it is regulated under this subpart.

§ 301.81-3 Quarantined areas.

- (a) The Administrator will quarantine each State or each portion of a State that is infested.

....

- (e) The areas described below are designated as quarantined areas:

....

Texas

....

Montgomery County. The entire county.

§ 301.81-4 Interstate movement of regulated articles from quarantined areas.

- (a) Any regulated article may be moved interstate from a quarantined area into or through an area that is not quarantined only if moved under

the following conditions:

- (1) With a certificate or limited permit issued and attached in accordance with §§ 301.81-5 and 301.81-9 of this subpart;
- (2) Without a certificate or limited permit, provided that each of the following conditions is met:
 - (i) The regulated article was moved into the quarantined area from an area that is not quarantined;
 - (ii) The point of origin is indicated on a waybill accompanying the regulated article;
 - (iii) The regulated article is moved through the quarantined area (without stopping except for refueling, or for traffic conditions, such as traffic lights or stop signs), or has been stored, packed, or parked in locations inaccessible to the imported fire ant, or in locations that have been treated in accordance with the methods and procedures prescribed in the Appendix to this subpart ("III. Regulatory Procedures"), while in or moving through any quarantined area; and
 - (iv) The article has not been combined or commingled with other articles so as to lose its individual identity; or
- (3) Without a certificate or limited permit provided the regulated article is a soil sample being moved to a laboratory approved by the Administrator to process, test, or analyze soil samples.

7 C.F.R. §§ 301.81, .81-2, .81-3(a), (e), .81-4(a) (footnotes omitted).

**CHIEF ADMINISTRATIVE LAW JUDGE'S
INITIAL DECISION AND ORDER
AS TO BILLY G. TURNER
(AS RESTATED)**

Billy G. Turner failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the material allegations in the Complaint are adopted as Findings of Fact, and this Decision and Order as to Billy G. Turner, d/b/a Wes and Mom Trucking, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Billy G. Turner, d/b/a Wes and Mom Trucking, is an individual whose mailing address is 110 3rd Street, Moore, Texas 78057.
2. On or about August 25, 1998, Billy G. Turner, in violation of 7 C.F.R. § 301.81-4(a), moved regulated articles (a used bulldozer and trailer, soil) from the quarantined area of Montgomery County, Texas, into the nonquarantined area of Arizona without a certificate or limited permit, as required.

Conclusions of Law

By reason of the facts contained in the Findings of Fact, Billy G. Turner violated the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.81-.81-10.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Billy G. Turner raises one issue in his September 27, 2000, letter to the Hearing Clerk [hereinafter Appeal Petition]. Billy G. Turner contends he filed a timely Answer to the Complaint in June 2000, as follows:

Sept. 27, 2000

To:Hearing Clerk

From: Herman E. Hoffman Jr.
Billy G. Turner

Docket 00-0010

This was filed in June on behafe [sic] of Herman Hoffman and Billy Turner. Since we were doing business together and the docket number was the same Mr. Hoffman was handling the matter.

Thank you
Billy Turner

Appeal Pet.

Billy G. Turner attached to the Appeal Petition an Answer which was filed

on June 27, 2000. The Answer reads as follows:

June 26, 2000

To: Hearing Clerk 202-720-9776

From: Herman E. Hoffman, Jr.

Docket: 00-0010

I. Deny the allegations.

A) No evidence was presented or made available for my evaluation.

B) No evidence said laws properly posted for public awareness [sic].

Herman

Hoffman

6-26-2000

The Answer, filed June 27, 2000, was filed within 20 days after the Hearing Clerk served Billy G. Turner with the Complaint, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). The only issue before me is whether the Answer filed June 27, 2000, is Billy G. Turner's Answer.

Section 1.136(a) of the Rules of Practice provides that an answer must be signed by the respondent or by the attorney of record in the proceeding, as follows:

§ 1.136 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint . . . , or such other time as may be specified therein, the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. The attorney may file an appearance of record prior to or simultaneously with the filing of the answer.

7 C.F.R. § 1.136(a).

Billy G. Turner did not sign the Answer filed June 27, 2000, and the Answer

does not indicate in any other way that it is Billy G. Turner's Answer. Instead, the Answer appears to be solely Herman E. Hoffman, Jr.'s Answer. First, the heading of the Answer states that it is from only one of the parties to this proceeding, Herman E. Hoffman, Jr. Second, the Answer is signed by only one of the parties to this proceeding, Herman E. Hoffman, Jr. Third, the body of the Answer indicates that it was filed on behalf of only one of the parties to this proceeding. Specifically, the Answer is written in the singular referring to "my evaluation."⁵ (Answer filed June 27, 2000 (emphasis added).) The word "my" is the possessive form of the pronoun "I" used attributively to indicate possession, agency, or reception of an action by the speaker.⁶ Had the Answer been filed on behalf of both Billy G. Turner and Herman E. Hoffman, Jr., as Billy G. Turner contends, the person drafting the Answer would be much more likely to have used the plural "our,"⁷ the possessive form of the pronoun "we."⁸

⁵ See *Texas Co. v. Globe Oil & Refining Co.*, 225 F.2d 725, 732 (7th Cir. 1955) (indicating "my" is singular); *Yancey v. Northern Pac. Ry.*, 112 P. 533, 534 (Mont. 1910) (stating "I," "my," and "me" are singular pronouns); *Brown v. Cooper*, 514 S.E.2d 857, 861 (Ga. Ct. App. 1999) (stating "my" is singular), *cert. denied* (June 3, 1999); *Skokie Gold Standard Liquors, Inc. v. Joseph E. Sagram & Sons, Inc.*, 452 N.E.2d 804, 807 (Ill. App. Ct. 1983) (indicating "my" is singular); *Bray v. Ellison*, 83 S.W. 96, 97 (Ky. Ct. App. 1904) (stating "I" and "my" are singular pronouns); *Matter of Estate of Lubins*, 656 N.Y.S.2d 851, 853 (N.Y. Surr. Ct. 1997) (stating "I," "my," and "me" are singular pronouns), *aff'd*, 673 N.Y.S.2d 204 (N.Y. App. Div. 1998).

⁶ The American Heritage Dictionary of the English Language New College Edition 867 (1976). See also *Waters v. Hawkins*, 764 S.W. 2d 736, 739 (Mo. Ct. App. 1989) (stating "my" is the possessive form of the pronoun "I").

⁷ See *Estate of Lidbury v. Commissioner*, 800 F.2d 649, 653 (7th Cir. 1986) (stating "we," "our," and "us" are plural); *Adkins v. Oppio*, 769 P.2d 62, 64 (Nev. 1989) (stating "we," "our," and "us" are plural pronouns); *In re Thompson's Estate*, 478 P.2d 174, 179 (Kan. 1970) (stating the use of plural pronouns (we, our, and us) is standard procedure dictated by the very nature of the joint execution of a single paper); *In re Estate of Chronister*, 454 P.2d 438, 442 (Kan. 1969) (stating "we" and "ours" are plural words); *Rich v. Mottek*, 226 N.Y.S.2d 428, 431 (N.Y. 1962) (stating "we" and "ours" are plural); *Kelly v. Gram*, 38 N.W.2d 460, 464 (S.D. 1949) (stating "we" and "ours" are plural); *Hill v. Godwin*, 81 So. 790, 791 (Miss. 1919) (stating "our" is a plural possessive pronoun); *Sinclair v. Investors' Syndicate*, 146 N.W. 1109, 1110 (Minn. 1914) (stating "we," "us," and "our" are plural pronouns); *Brown v. Cooper*, 514 S.E.2d 857, 861 (Ga. Ct. App. 1999) (stating "our" is plural), *cert. denied* (June 3, 1999); *Orso v. Lindsey*, 598 N.E.2d 1035, 1039 (Ill. App. Ct. 1992) (stating "we" and "our" are common plural terms); *Lappin v. Lane*, 120 Cal. 499, 502 (Cal. Ct. App. 1975) (stating "we" and "our" are plural pronouns); *State v. McClure*, 504 S.W.2d 664, 667 (Mo. Ct. App. 1974) (stating "we" and "our" are first person plural pronouns); *Lancaster v. Burris*, 352 S.W.2d 136, 138 (Tex. Civ. App. 1961) (stating "our" is a plural pronoun); *Dickerson v. Yarbrough*, 212 S.W.2d 975, 978 (Tex. Civ. App. 1948) (stating "our" is plural); *Kirkwood Trust Co. v. Joseph F. Dickmann Real Estate Co.*, 156 S.W.2d 54, 56 (Mo. Ct. App. 1941) (stating "our" and "we" are plural pronouns); *Bray v. Ellison*, 83 S.W. 96, 97 (Ky. Ct. App. 1904) (stating "we" and "our" are plural); *Matter of*

I find that the use of the word “my” is a strong indication that the Answer was filed only on behalf of the party who signed the Answer, Herman E. Hoffman, Jr.

Section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) also provides an answer may be signed by an attorney of record and the attorney may file an appearance of record prior to or simultaneous with the filing of the answer. The *sine qua non* which makes one an attorney of record is the execution and filing of an appearance (7 C.F.R. §§ 1.136(a), .141(c)). The filing of an appearance places all on notice that the person signing the appearance is the person who has authority to act for and bind his or her client in the pending proceeding. Herman E. Hoffman, Jr.’s only filing in this proceeding is the Answer which does not in any way indicate that it constitutes Herman E. Hoffman, Jr.’s appearance on behalf of Billy G. Turner. Moreover, Billy G. Turner’s Appeal Petition, in which he contends the Answer filed June 27, 2000, was filed on his behalf, is not signed by Herman E. Hoffman, Jr.

I conclude that the Answer filed June 27, 2000, was not Billy G. Turner’s Answer. Further, the record does not establish that Herman E. Hoffman, Jr., was, or is, an attorney of record appearing on behalf of Billy G. Turner. Instead, the record indicates that Herman E. Hoffman, Jr., appears for himself as a party in this proceeding. Therefore, Billy G. Turner did not file a timely answer; Billy G. Turner is deemed, for the purposes of this proceeding, to have admitted the allegations in the Complaint; and the Chief ALJ properly issued the Initial Decision and Order as to Billy G. Turner.

For the foregoing reasons, the following Order should be issued.

ORDER

Billy G. Turner, d/b/a Wes and Mom Trucking, is assessed a \$1,000 civil penalty. The civil penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and sent to:

United States Department of Agriculture

Estate of Lubins, 656 N.Y.S.2d 851, 853 (N.Y. Surr. Ct. 1997) (stating “we,” “our,” and “us” are plural pronouns), *aff’d*, 673 N.Y.S.2d 204 (N.Y. App. Div. 1998); *Thompson v. Boyd*, 32 Cal. 513, 521 (Cal. Dist. App. 1963) (indicating “we” and “our” are plural).

⁸ The American Heritage Dictionary of the English Language New College Edition 932 (1976). See also *Waters v. Hawkins*, 764 S.W.2d 736, 739 (Mo. Ct. App. 1989) (stating “our” is the possessive form of the pronoun “we”).

HERMAN E. HOFFMAN, JR et. al.
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APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Billy G. Turner's payment of the civil penalty shall be sent to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 60 days after service of this Order on Billy G. Turner. Billy G. Turner shall state on the certified check or money order that payment is in reference to P.Q. Docket No. 00-0010.
